No. 79-1213

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. May a State, absent proof that it has engaged in previous employment discrimination, voluntarily establish "goals", set aside positions, and grant preferences in public employment for the hiring and promotion of less qualified racial "minorities" and of women, to the detriment of all other applicants and employees? and,

2. Does the "safe and efficient operation of correctional facilities" constitute a sufficiently compelling State interest to justify the use of absolute racial and sex-based preferences in public hiring and promotion; if so, is proof of that State interest, after subjection to strict scrutiny, supported anywhere in this record? and,

3. Is it constitutionally sufficient for a State to adopt preferential public employment practices based exclusively upon conclusory confessions of "adverse impact" of its past policies and practices on "minorities" and women? and,

4. Is it constitutionally appropriate for a State to institute employment "goals" for "minorities", based upon prison inmate population, rather than upon the "relevant labor market" or "applicant flow"? and,

5. May the "relevant labor force" for the hiring of women be based upon state-wide employment statistics for women, as opposed to "applicant flow", or labor force statistics, for women in the "relevant geographic area" in which the various correctional institutions are located?

PARTIES

Petitioners are Wayne Minnick and Henry J. Darden, on behalf of themselves and all others similarly situated; and the California Correctional Officers Association ("CCOA" herein), a recognized bargaining agent for correctional officers, on behalf of itself and its members (C.T. pp. 2-3). Respondents are the California Department of Corrections ("Department" herein); J. J. Enomoto, in his capacity as

Director of the California Department of Corrections; Carlos Sanchez, in his capacity as Assistant Director of the Department of Corrections; and the California State Personnel Board (C.T. pp. 3-4, 66-67).

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 95 Cal.App.3d 506 (1979), and may be found in the Appendix to the Petition to Writ of Certiorari ("Pet.App." herein) at pp. A-1 to A-24. The modification of the Opinion, and Denial of a Petition for Rehearing, is reported at 96 Cal.App.3d 626a (1979) and may be found at Pet.App. B-1 through B-3. The Order Denying Petitioners' Petition for Hearing by the California Supreme Court is reported at 25 C.3d, Minutes 2 (Number 23, California Official Reports) and may be found at Pet.App. C. The Opinion of the Trial Court is not reported but may be found at Pet.App. D (entitled "Notice of Intended Decision"). The Judgment appears at Pet.App. E; the Declaratory Judgment appears at Pet.App. F; the Trial Court's Permanent Injunction appears at Pet.App. G.

JURISDICTION

The Opinion of the California Court of Appeal (First Appellate District, Division Four), was filed on July 27, 1979. That Court's Order denying your Petitioners' Petition for a Rehearing, and an accompanying modification of the initial Opinion, was filed on August 23, 1979. A Petition for Hearing by the California Supreme Court was timely filed on September 5, 1979, and was denied by the Supreme Court on November 8, 1979. On February 5, 1980, the Petition for Writ of Certiorari to the Court of Appeal was filed with the Clerk of this Court. The Petition was granted on July 2, 1980. Jurisdiction lies under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are: U.S.Const.Amend XIV; 42 U.S.C. §§ 1981, 1983, and 2000(e), *et seq.*; Calif.Const. Article I, §§ 7 and 8; Calif. Labor Code §§ 1410, *et seq.*, and Calif.Gov.Code § 50084, all of which are set forth *seriatim* in Pet.App.H.

STATEMENT OF THE CASE

INTRODUCTION

This Case raises important issues concerning the circumstances and manner under which a public employer may voluntarily grant preferences in employment opportunities based upon race and sex. Answers to serious constitutional questions are urgently needed for the guidance of public employees, as well as states and other public employers, subject to the mandates of the Fourteenth Amendment to the Constitution, Title VII (42 U.S.C. 2000e), and 42 U.S.C. 1981 and 1983.

Even if this Court decides that, under certain circumstances, compeling state interests for the granting of racial or sex-based preference may exist under the Fourteenth Amendment, here your Petitioners must prevail because the "compelling interests" advanced by the Respondents

(and, more importantly, the conduct engaged in by the Respondents) cannot survive the "strict scrutiny" of such classifications required under the Fourteenth Amendment.

The Trial Court found no evidence that hiring and promotion based upon race (to accomplish the goal of "mirroring" the inmate population) was necessary to maintain the safe and efficient operation of State prisons. Having failed to carry their burden, the Respondents, *after* trial, *after* the California Supreme Court had issued its decision in *Bakke,* 18 C.3d 34 (1976), and *after* the substitution of new counsel, attempted to reopen the case to establish that the real reason for the adoption of their Affirmative Action Plan (and consequent racial and sex-based preferences) was to remedy past discrimination. Respondents belatedly so contended despite the fact that they had already filed a binding answer to interrogatories denying that they had ever previously engaged in any prior discrimination. [*infra* at p. 15] There was no demonstrable relationship, nor any conceivable nexus, between any prior discrimination (intentional or otherwise) and the plan which was subsequently adopted to reflect the racial mix of the inmate population. In fact, the Respondents adopted a different benchmark for the hiring and promotion of women, simply because the percentage of women inmates in California State Prisons was too low to require any increase in the percentage of women in the Department's work force.

Acknowledging the lack of any nexus between the Department's plan as drafted and implemented and any alleged past discrimination, (and the belated nature of the contention), the Court of Appeal struck from Respondents' Brief any reference to such evidence not introduced at trial: see, *infra,* p. 14; see also the Court of Appeal Opinion, at Pet.App.A-22 and A-23; Finding of Fact, No. 13, by the Trial Court, Pet.App.F-5.

Notwithstanding the requirements of the "substantial evidence" rule, the Court of Appeal overturned, *sub rosa,*

some of the crucial Trial Court's Findings of Fact with regard to "compelling state interests"—i.e., safety and efficiency in the prisons. Citing no evidence supporting the theories advanced by the Respondents, and without negating or rejecting the overwhelming evidence supporting Petitioners' and Trial Court's position that "mirroring" the inmate population racially with the work force was not necessary to maximize safety or efficiency in the prisons, the Court of Appeal misconstrued one Finding of Fact of the Trial Court to overturn another Finding of Fact and reject the Trial Court's Conclusions of Law. By so doing, the Court of Appeal breathed life back into, and indeed resurrected, a dubious sociological theory that the Trial Court had rejected based on the oral, documentary, and expert testimony before it.

STATEMENT OF FACTS

In 1974, the California Department of Corrections voluntarily adopted and implemented an "Affirmative Action Plan" ("AAP" herein).[1] The stated principal objective of the AAP was to increase the number of "minority" employees in the Department to a level equalling at least seventy percent (70%) of any given "minority" in the inmate population of the Department (i.e., state prisoners) and to increase the number of female employees to a percentage equivalent to that in the total California labor force on April, 1970 (Pet.App. A pp. 5-6). Goals were set for specified minority groups, including "Black", "Asian", "Spanish surname", "Native American", and "other extraction." An "overall" employment goal of thirty-six percent (36%) minorities and thirty-eight percent (38%) women was established. The ostensible purpose of the AAP was to improve relationships with prisoners and to reduce racial

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[1]The 1974 AAP is Trial Exhibit ("Ex." herein) G. The AAP was revised in 1975 and was in effect during the trial of this case (Ex. R.) As far as Petitioners are aware, for purposes of this litigation Ex. R is the operable document.

conflict and violence in the prison system (Pet.App. A, p. 5). The objectives of the AAP included all areas of employment, including hiring, promotion, transfer, training, and work assignments (Pet.App. A, p. 6).

Although the AAP purported to establish "goals," and did not refer to "quotas", the evidence presented at Trial (described *infra*) revealed both policy and conduct by the Respondents to set aside positions and to grant preferences to attain the objectives of the AAP.[2] Some positions were officially reserved for minorities or women only and others were informally set aside. Minorities and women were granted such a competitive advantage over other applicants that their race or sex became the "but for" cause of their hire or promotion. The cumulative evidence compelled the Trial Court to find that under the AAP the respondents had engaged in a pattern and practice of granting preferences on the basis of sex and ethnic origin, not on the qualifications of individuals. The Trial Court's Finding of Fact No. 8 states as follows:

> "Defendants, Department of Corrections, and J. J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department. In so doing, the defendants were motivated at least in part by an affirmative action plan, adopted effective July 1, 1974. A copy of that plan is defendants' Exhibit "G" in evidence. The affirmative action plan was revised effective April 1, 1975. A copy of the revised affirmative action plan is Exhibit "R" in evidence. In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not solely on the qualifications of the individuals involved, or their merits." (Pet.App. F p. 4)

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[2]In its "Statement of Policy", the AAP mandated that "all employees of the Department of Corrections are expected to commit themselves to the accomplishment of the goals of the affirmative action program." (Ex. R.).

A. Positions Were Set Aside for Minorities or Women Only.

Some job announcements specified that positions were available for minorities or women only. The titles of various positions were advertised as "Correctional Sergeant—Minority" (Ex. 11); "Correctional Counselor I—Female" (Ex. R; R.T. 98-99); "Records Officer I—Minority" and "Correctional Lieutenant—Minority" (Ex. 13).

Often the reservation of positions for minorities and women was done less overtly. Promotional, hiring, and transfer policies, which appeared neutral on their face, in practice restricted the possibility of appointment to specified ethnic groups or women. Transfers became an important aspect of the AAP, since "parity" was to be achieved both in the "overall" Department work force and in each particular institution (R.T. 309: 10-19; R.T. 376: 18-20). The record is replete with evidence illustrating the application of the Department's policies.

The Superintendent of one facility rejected a transfer request from a Caucasian officer, stating:

> "We are not accepting any transfers from other institutions unless the requestor is a minority member." (Ex. 10, p. 4).

To a grievance filed by CCOA as a result of such denial, Respondent Enimoto replied as follows:

> "In view of our affirmative action policy I believe Superintendent McCarthy acted well within my expectations in determining what his affirmative actions program needs are and for establishing methods for obtaining the goal. If affirmative action is to be meaningful then we must be decisive on our determination to meet our goals. This often means that some people will now have to wait a little longer than they did in the past." [Letter from Director Enomoto dated November 3, 1975, contained in Ex. 10]

In 1975, Marvin Music applied for the promotional position of Acting Correctional Program Supervisor III.

He talked to Program Administrators Maddox and Vasquez concerning the position in the Susanville Facility (R.T. 134). Mr. Music had difficulty in even obtaining the standard interview. During the interview, Mr. Vasquez informed him that he "was going to appoint one of his fellow Chicano officers to the position," stating that he was going to give the minority a chance to "see what it was like, a chance to see what it was like at the top." (R.T. 134-135). One Oscar Pina, a minority, got the vacancy (R.T. 135).

When Tommy Simpson applied for promotion to Correctional Sergeant at the Tehachapi Facility, he was informed by the Program Administrator that he "wouldn't be considered" since the Administrator wanted to hire minorities, preferably "like himself" (whereupon he held out his arm and pointed to it: the Administrator was black). [R.T. 150: 22-24; 150-151]. Enomoto, then the Superintendent of that facility, denied Simpson's grievance concerning the appointment, stating:

> ". . . he was sorry but that the affirmative action was something that we all had to deal with, and several of us would have to pay the price for it, and that I was one of them." (R.T. 151-152).

The Records Officer in charge of hiring clerical workers at Chino was instructed not even to consider caucasian candidates (R.T. 710). To obtain minority employees for certain positions, the requirements were down-graded if applicants from the "targeted class" (i.e., minorities) were not available (R.T. 715). The Records Officer further testified that, in 1976, there had been a "big push" from his superiors to hire Mexican-American employees (R.T. 720). He wrote a memo protesting the Department's policy, stating as follows:

> "My instructions under the affirmative action program, are, until notified otherwise, I am not to consider any

> caucasian applicants . . . Knowing that the institution policy is to hire only minorities until a selective quota is met, I told Mike Wilson, Personnel Officer, that going through the facade of interviewing candidates was untruthful and misleading on my part and unless a minority candidate was unavailable, why interview white candidates?" (Ex. M)[3].

As a result of the Records Officers' testimony at trial, the Associate Superintendent sent a scathing two page memo to his immediate supervisor which, when brought to its attention, led the Trial Court to issue a Protective Order preventing retaliation against that officer, or any other employee, for testifying or offering evidence in the case (R.T. 816-819; C.T. 274-277). Neither in that memo, nor in the meeting attended by the Associate Superintendent, as well as the Superintendent, was the accuracy of the Records Officer's memo questioned (R.T. 724-725).

In 1976, Director Enomoto implemented a reorganization related to affirmative action. He sent out a memo concerning the recruitment of an assistant to the Deputy Director, stating as follows:

> "I made a decision *that the first priority was the recruitment of a Mexican-American male* to function basically as the Assistant to Dorothy. Interviews, with input from the CCWA [Chicano Correctional Workers Association] on possible candidates, have been held, a decision will be made soon. No *other* positions have been finalized." (Emphasis added; Ex. 38)

The record contains numerous examples of the setting aside of positions for women. In 1975 a notice announcing the position of Field Representative at the Board of Corrections stated:

> *"In keeping with the Department's affirmative action program, applications will be accepted from women*

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[3]The Records Officer did not talk to anyone about writing the memo and was not told by anyone to write it. He was not then, nor had he even been, a member of Petitioner CCOA (R.T. 729).

> *only from the rank of Sergeant II and including Program Supervisor.*" (Emphasis in original); Ex. 6 p. 6)

When a grievance was filed as a result of the announcement, the original notice was withdrawn, and a letter was sent by the Executive Officer of the Board of Corrections to CCOA (with a carbon copy to the Assistant Director of the Department) stating:

> "While I acknowledge the validity of your complaint (both personally and on behalf of CCOA), you *force me as an Administrator to be dishonest as I intend to try to find a qualified female to fill the slot.*" (Emphasis added; Ex. 6)

The Department frequently requested "female only" certification from the State Personnel Board. Although the Board is authorized to issue such certifications only when the objective requirements of a particular job absolutely necessitate that employees of only one sex fill the position, the Department used this process to set aside positions for women. In a letter from the Assistant Personnel Officer to the SPB requesting a "female only certification" for Correctional Sergeant, the justification was based in terms of the need to "balance" the work force by sex. (Ex. 25)

B. Minorities and Women were Given a Competitive Advantage in Employment Opportunities because of their Race or Sex.

Where positions were not specifically *reserved* for minorities or women, the Department granted preferences so that lesser-qualified minorities and women received appointments over more qualified (and, in some cases, significantly more qualified) caucasians or males. The relative qualifications of candidates were based not only on objective standards, including written tests, but on other, more subjective criteria, including the perceived ability to establish rapport, job history, and education (R.T. 304-305; 689-691). Even when these factors produced clearly more qualified non-minority or male candidates on eligible lists, the

race or sex of candidates quickly became the "but for" cause of hiring or promotion. E.g., R.T. 307:3-11; R.T. 304-307; R.T. 689-691.

Enomoto was one of a number of officials who acknowledged that if the "goals" had not been achieved, minorities and women who were "reasonably qualified" would get jobs over others who might be considerably more qualified. In August of 1975, the Director denied a grievance stating:

> "In addition it appears that Supt. Morris has also adhered to a statement I often make to highlight my beliefs that with reasonably equal qualifications, when one is a minority and one is a non-minority, then the job is given to the minority (Ex. 16)."

At Trial, the Director admitted that his statement was an accurate description of how the AAP worked (R.T. 289).

In testimony given at deposition and read at trial, the Chief Deputy Director pointed out that if "parity" had been reached in a particular classification, then the "most qualified" person would get the job, regardless of race. However, if "parity" had not been reached, then the job would go to a lesser qualified minority (R.T. 690-691). The Assistant Director of Women's Affairs (who became the official in charge of affirmative action) testified that if "parity" had not been reached, positions would be given to minorities and women, rather than substantially more qualified caucasians or men.[4] Ms. Stevens-Roby established goals, directives, and procedures of the AAP, and she presented state-wide seminars and work-shops thereon (R.T. 175), and no one in the Department had greater responsibility to oversee AAP operation as to women than her. (R.T. 176-177).

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[4]During the deposition, in response to questions asked by her own attorney, Deputy Attorney General Lieberman, Ms. Stevens-Roby testified as follows: "Q. [by Deputy Attorney General]: he also asked you a hypothetical question *where no parity had existed*

The drastic degree to which preferences were afforded is best seen from a statement by Director Enomoto made shortly after his appointment: he announced that white males would have to wait *at least five years* to get a promotion in his Department (R.T. 25-26; 46-47; 284-285).

C. Purported Justification for the Use of Racial and Sex-Based Preferences.

At Trial, Respondents justified their use of race and sex in hiring and promotions as necessary to serve the "compelling state interest" of minimizing racial tensions in the prisons, thereby furthering orderly and efficient prison management. While recognizing that such an interest might justify consideration of race and sex in making *job assign-*

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with respect to the composition of that classification and asked you to assume that there was a minority candidate and a non-minority, and the minority [sic] was more qualified than the non-minority [sic] candidate.

You testified, as I recall, that the minority candidate should be given the appointment *even though* the non-minority candidate might be a *little bit* more qualified. Do you recall that? A. Uh-huh (affirmative). Q. In that same hypothetical *if the non-minority* were *substantially more qualified than the minority*, what would be your opinion? A. *And parity had not been reached?* Q. That's correct. A. My opinion would be that the minorities should have the job. (Emphasis added; R.T. 111-112).

Further: Q. [By Mr. Lieberman]: Let me give you one more hypothetical. We have a situation where there is no parity and we have a male applying for the position and a female applying for the position, and by past practice, both males and females have been appointed to this position. A. Uh-huh (affirmative). Q. The male is *substantially more qualified than the female.* Now under departmental policy, which person should be recommended for this position? A. If parity has not been reached, *the female.* Q. Even though she is substantially the less qualified than the male? A. As long as she has qualified for the position, if parity has not been reached." [Emphasis added; R.T. 113].

Ms. Stevens-Roby testified that the transcripts submitted to her were an "accurate reflection of what she said that day" and that she understood the questions submitted to her by Mr. Lieberman (R.T. 184-185).

ments and delegating *responsibilities*,[5] the Trial Court found no evidence to support the necessity for the use of race and sex in basic *hiring* and *promotion* decisions.[6] Thus, the Judgment and Permanent Injunction do *not* prevent the Department, for example, from assigning an employee of one race to infiltrate a prison gang comprised solely of members of that race; nor does the Injunction preclude the assignment of an employee of a particular race to speak to members of a gang who request a spokesperson of such race in a riot or other emergency. Indeed, Petitioners never sought any order precluding the Department from dealing with such extraordinary situations. Respondents submitted absolutely no evidence suggesting that there are insufficient employees of any and all racial categories, at each and every prison facility, to allow the Department this flexibility in such emergencies.

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[5]The Trial Court's Finding of Fact No. 19 states as follows:

> "The unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibility of its employees. Because of the conditions and circumstances within California prisons and throughout the Department of Corrections, in making job assignments and in determining employment responsibilities it is necessary for the Department to consider, among other factors, the composition of the existing work force and of the inmate population, and of the race and sex of employees, in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." (Pet. App. F, pp. 6-7).

[6]The Trial Court's Finding of Fact No. 8 states in pertinent part as follows:

> "Defendants Department of Corrections and Jero J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department . . ." (Pet. App. F, p. 4).

The record furnishes no support for the contention that a particular racial or sexual composition of the correctional work force reduces racial conflict and violence. Substantial evidence supports the conclusion of the Trial Court that while race or sex might be considered with regard to job assignments, they cannot constitutionally be the "but for" cause of lesser-qualified persons receiving jobs or promotions over more qualified applicants.

During Trial, Respondents never advanced the suggestion that amelioration of any past discrimination was the compelling state interest justifying the use of its preferential employment practices. Instead, Respondents claimed that the use of race in hiring practices was necessary to solve the problem of violence in the prisons.[7]

Abundant substantial evidence support the Trial Court's finding that hiring and promotion on the basis of race was not necessary to serve any asserted State interest. In regards to the ability to establish rapport with inmates, for example, the Respondents' own witnesses testified that several factors other than race could be more

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[7]At trial, Deputy Attorney General Gordon Zane stated as follows:

"Our defenses are on two levels, Your Honor.

First of all, we're contending in this case that the Department only hires the most qualified people, and that's their policy. There may be exceptions down below, but that's their policy.

On the other hand, if the Court so should find that they're using race as a factor in the hiring process as a qualification process, then we have the burden of showing that they must demonstrate real reason for doing this. And that's what we've been trying to do with these witnesses, showing that they have a real problem . . . I have a compelling state interest if the Court should find that race is being used as a factor. To do that, I have to show that they have a real problem that they are trying to solve, the violence in the prisons, the operation of the prisons.

And the next step is to show that they're each trying to solve it by hiring minorities in the ratios they're trying to hire." (R.T. 660-661).

important.[8] Having failed to prove at trial any relationship between minority levels of employment and the reduction of racial violence, Respondents attempted to present their evidence to the Court of Appeal for the first time, in the form of citations to newspaper articles, books and treatises. The Court of Appeal granted Petitioners' Motion to Strike this evidence, as follows:

> "The motion to strike portions of Appellants' Opening Brief is granted. Those portions of said brief making reference to newspaper articles, books or treatises, which in no way were part of the record in the Trial Court and additionally were not cited or relied upon by any of the experts called by the parties; and any and all mention of documents submitted in the motion to argument record filed in the Trial Court, is ordered stricken. The designation of all such newspaper articles, books and treatises is attached hereto and made a part

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[8]Respondents' witness Dr. Lopez-Lee, a psychologist, testified that although black correctional officers could often best relate to black prisoners, and Hispanic correctional officers to Hispanic prisoners, other factors (including economic background, educational level and degree of sympathy) could overshadow race as a factor. Thus, he acknowledged that a black Harvard professor would be more likely to "relate" to a group of white law students than would a white manual laborer. (R.T. 854-856).

Respondents' witness Federal Warden Bill Garrison testified that when trouble arose among prisoners, he did not automatically turn to a guard of the same race as the prisoners, but would make assignments on the ability of guards to deal with a particular group concerning a particular problem (R.T. 584).

The Director of the Department himself testified that the ability of officers to relate to inmates on the basis of race varied from individual to individual (R.T. 314). On the other hand, petitioners' witness Dr. Thomas Szasz, a well-known psychiatrist, testified that his research revealed no scholarly literature indicating that officers of the same race as prisoners could, or could not, communicate better with these prisoners; to the contrary, the literature indicated that prisoners respect certain characteristics in officers (e.g., fairness) and that one study indicated that only five to ten percent of inmates attributed their feelings about correctional officers to their race (R.T. 754).

of this order." [See order of January 10, 1979, a part of record forwarded from Clerk of Court of Appeal.]

Lastly, the Trial Court specifically found that the AAP had *not* been adopted to remedy any past discrimination. Although the Trial Court acknowledged long-standing discrimination against minorities and women by American society, it found that the preferential employment practices of Respondents were not justified by, *nor did they remedy,* such past wrongs. (Finding of Fact No. 13, Pet. App. F. p. 5).

Despite their binding pre-trial disclaimer of any past discrimination,[9] after trial, and after retaining new counsel, Respondents moved to augment the record to introduce evidence of past discrimination in the form of certain Declarations. The Court of Appeal upheld the Trial Court's denial of the Motion, deeming such evidence "irrelevant" (for the reasons stated in Finding of Fact, No. 13 above), adding that the Motion was "made by after-thought and much too late". (Pet.App. A. p. 23).

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[9]In response to an interrogatory, the Respondents denied any prior discrimination. They did advance an assertion of "adverse impact", which the Court of Appeal noted as the *only* substantial evidence in the record of past discrimination (Pet.App. A. p. 9). The Interrogatory, and Answer, were as follows:

"INTERROGATORY 1. Do you contend for the purposes of this litigation that the Department of Corrections of the State of California, or any of its agents, employees, representatives, officers, officials or other authorized representatives, illegally or improperly discriminated against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of that person's race, color, creed, sex or national origin?

ANSWER: For the purpose of this litigation, the Department of Corrections of the State of California does not allege that it has wilfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities or employment wages, hours, or other terms and conditions of employment on the basis of a person's

In regards to sex-based preference, Respondents advanced no important governmental interest other than that proposed by the very terms of the AAP, i.e., the maintenance of "balance" in the work force. Testimony at trial was scant. Two of Respondents' witnesses were asked if they thought that women brought any "special attributes" or "an extra dimension or quality" to the job (R.T. 444; 485). One responded that "the dining rooms were much more orderly and well-behaved", but could add no other specifics (R.T. 485-486). The other responded that they "make a very abnormal environment a little more normal", but was hard pressed to add any specifics (R.T. 444-445). Finally, on a rather bizarre note, an "expert" witness claimed that female correctional officers were better able to rehabilitate sex offenders and rapists. R.T. 614-615.

Thus, this case presents a situation where a public entity has completely reserved entry-level and promotional positions for minorities and/or women and has granted preferences to such minorities or women in appointments to positions over more qualified non-minorities or males. The Trial Court rejected Respondents' rationale to justify such racial and sexual categorization—that the racial composition of the work force should mirror that of the inmate population to promote safety in the prisons. The Trial Court's rejection of this highly dubious proposition was based on expert testimony and other evidence introduced by Petitioners. Thus, Respondents are left with no defense to their racial and sexual categorizations but that of the questionable social goal of achieving particular racial and sexual balance in a public work force.

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race, color, creed, sex and national origin. The Department does allege, however, that as a result of its past hiring and promotion practices and procedures, there has been an adverse discriminatory impact on certain minorities and the female sex, in the terms of initial hiring and also promotion." (C.T. pp. 121-122).

SUMMARY OF ARGUMENT

In an attempt to increase the percentage of minorities and women in its work force, the Department of Corrections adopted an "Affirmative Action Program". The announced objective of the program was a racially and sexually-balanced work force, the ethnic composition of which would "mirror" the inmate population by reflecting a balance of at least seventy percent (70%) of the various racial and ethnic groups in the inmate population. The sexual make-up of the work force would reflect the percentage of women in the California work force generally. The ostensible purpose of this program of preferences was the safe and efficient operation of correctional facilities by the amelioration of racial conflict and violence within the walls of the prisons. The AAP itself made no reference, direct or oblique, to the purpose of remedying past acts of discrimination by the Department against women or minorities.

Under the aegis of its AAP, the Department granted absolute preference to minority and female candidates for certain entry level and promotional positions by completely setting-aside certain positions for female and minority candidates, so that non-minorities or men could not even compete. Other positions, although not concretely set aside, were awarded to candidates because of their race, ethnic background, or sex in a more covert manner, so that less-qualified minorities or women received appointments over more-qualified caucasians or males.

The imposition of burdens, and the granting of extraordinary benefits, to citizens on the basis of their race or sex by the State violates the provisions of the Fourteenth Amendment guaranteeing to all persons "equal protection of the laws". The creation of artificial classifications by a State on the basis of race imposes upon the Courts the duty to engage in "strict scrutiny" of such governmentally created racial classification, to determine whether there is a sufficiently compelling State interest to justify the use of such preferential classifications. If a State carries

the heavy burden of establishing such State interests, the State must then establish that the classification is necessary for, and narrowly drawn and tailored to, the achievement of the compelling State interest, and that there exist no other, less drastic, or alternative means available to the State to achieve its ends. The legislative history surrounding the Fourteenth Amendment (particularly the Congressional debates) clearly establishes that the Amendment protects non-minorities and males, even where a State categorizes its citizens by race or sex for "benign" purposes. The prohibitions of Title VII, of course, preclude employment discrimination against *all persons* on the basis of their race or sex.

At trial, the Court subjected the State's racial and gender-based classifications to "strict scrutiny" and found them completely lacking. While agreeing that the amelioration of racial conflict and violence within the prisons was a significant State interest justifying the limited use of race or gender in making assignments and transfers, the Trial Court found that the State had advanced no compelling State interest justifying the use of such preferences in decisions to hire or promote. Far less drastic and intrusive means to reach the same end (such as intensive recruiting, training, etc.) were available without imposing any drastic diminution on the reasonable expectations of non-minority and male employees.

The AAP itself did not recite that an underlying purpose was to remedy past discrimination. At trial, Respondents' eschewed any such justification for the program. After trial, and after the Court had rendered its preliminary ruling and decision, Respondents retained new counsel and moved to reopen the record to advance, for the first time, the theory that a purpose of the program was to ameliorate the effects of past discrimination. The Trial Court rejected this attempt as untimely and irrelevant. Respondents showing was predicated entirely upon "adverse impact". Mere "adverse impact" is not a sufficiently compelling State interest for

the granting of racial or sex-based preference in public employment.

Notwithstanding this abundance of substantial evidence, the Court of Appeal reversed by declaring that the Trial Court's approval of the use of sex or race in making *assignments* and *transfers*, under unique situations, constituted an oblique "finding" of a compelling interest sufficient to allow the use of racial or sex-based preference in hiring and promotion. Ignoring the "substantial evidence rule", the Court of Appeal did not bother to negate or reject the other findings of the Trial Court, or to discredit the abundant testimony undercutting the rationale advanced at trial by the Respondents. Instead, the Court of Appeal assumed that an affirmative action plan could be adopted by a public agency to remedy its past acts of discrimination, even though both the Trial and Appellate Courts had refused to augment the record to allow the Respondents to make an untimely and belated showing of claimed past employment sins. The slender straw upon which the Court of Appeal based its decision was its belief that the record indicated "some evidence" of a State interest in maintaining safe and non-violent prisons (an assertion never contested by Petitioners), and leaped from this conclusion to the totally unsupported premise that employment decisions based upon race and sex were necessary to effectuate this end.

Assuming the establishment of a compelling State interest, the AAP was neither narrowly drawn nor of limited duration. As drafted and implemented, the Program totally excluded caucasians and males from any competition in certain entry level and promotional positions, and where concrete "set asides" of positions were not made, the Program was so implemented by the Department and staff that, as a matter of policy, lesser-qualified minorities or women were hired or promoted over more-qualified non-minority persons. Since the AAP was predicated upon

"mirroring" the inmate population, the Plan was of unlimited duration, as the inmate population constantly varies. The Plan continued indefinitely, was without a termination date, and was totally inflexible, providing no appeal rights for non-minorities who had been adversely affected by it. It benefits persons who have never been the victims of any discrimination.

Unlike prior plans approved by this Court, the AAP was not the fruit of arm's-length collective bargaining between a recognized employee organization and employer, both arguably guilty of prior employment discrimination against protected minorities. Indeed, the Plan was steadfastly opposed by Petitioner CCOA and had been unilaterally imposed by the employer, with drastic impact upon innocent co-workers who naturally perceived the Plan as illegitimate and ill advised.

In regards to their sex-based preferences, Respondents advanced only two defenses, namely that the presence of females in the correctional setting made an abnormal social situation slightly more normal and that the dining rooms appeared to be neater and cleaner. In passing, one Respondent witness suggested that female correctional officers were better able to rehabilitate rapists and other sex offenders. Under long-established California law, sex is a "suspect classification" subject to the "strict scrutiny" test, and the Trial Court understandably rejected these defenses as utterly deficient to establish a compelling State interest. Absent even "strict scrutiny", the rationale for the sex-based preferences is utterly lacking, based on sexual stereotypes, and totally conjectural.

Indeed, a proper affirmative action program, of limited duration, where race and sex become factors if the employer and union in question have been arguably guilty of prior employment discrimination, may be constitutionally permissible. Traditional principles of equity must be considered and the legitimate expectations of co-workers and co-applicants for employment, of all races and both sexes, must

be taken into account. The AAP in question was of indefinite duration, often inflexible, granted absolute preference by creating absolute exclusions or operated to hire or appoint persons less qualified than their competitors, and was neither drafted, implemented, or administered for the purpose of remedying any past acts of employment discrimination, intentional or otherwise. Instead, the AAP was adopted to advance the vaguely defined and ill-conceived sociological goal, often rejected by this Court in the past, of assigning employment opportunities and job tasks to citizens on the basis of their race or sex based upon the assumption that they can better serve persons of "their own" race or sex than can other members of our diverse society. Such an AAP is without legal precedent, support, or reason, either in common sense or in law, and was properly struck down by the Trial Court.

ARGUMENT

I.

ANY USE OF RACIAL CLASSIFICATION MUST BE SUBJECT TO STRICT SCRUTINY, MUST BE JUSTIFIED BY A COMPELLING STATE INTEREST, AND MUST BE NARROWLY DRAWN TO ACHIEVE THAT INTEREST.

This Court has long held that racial classifications used to the disadvantage, or benefit, of any individuals or groups because of their race or ethnicity must be subjected to strict scrutiny, must be justified by a compelling state interest, and must be narrowly drawn to achieve that interest. *Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. State of Florida,* 379 U.S. 184 (1964); *In re Griffiths,* 413 U.S. 717 (1973). The "strict scrutiny" test utilized by this Court, finds compelling support in the legislative history of the Fourteenth Amendment.

A. The Legislative History of the Fourteenth Amendment Indicates that the Amendment Was Meant to Protect All Groups and Not Simply Racial Minorities.

Whatever might be said about the somewhat inconclusive legislative history of Title VII of the Civil Rights Act of 1964 (discussed in both the majority and dissenting opinions in *United Steelworkers of America, AFL-CIO v. Weber*, et al., ... U.S. ....., 99 S.Ct. 272, 61 L.Ed. 480 (1979) it is abundantly clear that the framers of the Fourteenth Amendment to the United States Constitution never intended that states could ever favor minorities (and specifically black citizens) to the disadvantage of white citizens consistent with the Constitution. Indeed, the supporters of the Fourteenth Amendment only intended that minorities be treated equally with whites: See R. Berger, "Government by Judiciary," (1977), 166-192.

The Amendment's supporters desired that all races be treated *alike*; no race could be singled out above any other. As Congressman Schellabarger of Ohio stated, during session in 1866,

> ". . . whatever rights as to each of these enumerated civil . . . matters the State may confer upon one race or color of the citizens shall be held *by all races in equality* . . . It secures . . . equality of protection in those enumerated civil rights which the States may deem proper to confer upon *any* races . . ." Cong. Globe, 39th Cong., 1st Sess. 1866, 1293. (Emphasis added)

Congressman Stevens of Pennsylvania explained:

> "Whatever law protects the white man shall afford equal protection to the black man. Whatever means of redress is afforded to one *shall be afforded to all.* Whatever law allows the white man to testify in court shall allow the man of color to do the same." Cong. Globe, *Ibid.*, 2459. (Emphasis added.)

Emphasizing that the Amendment was applicable to all races, Congressman Niblack explained that:

> ". . . laws must be made equal; they must be administered equally *upon all classes* without regard to color or race." *Ibid.*, 1056 (Emphasis added).

As final examples of the intent and purpose of the Fourteenth Amendment to insure equality, and to prohibit the favoring of any race over any other, we need only examine the statements of Senator Howard and Representative James Wilson of Iowa. Thus, Senator Howard stated as follows:

> "This [the Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . Ought not the time to be now passed when *one measure of justice* is to be meted out to a member of one caste *while another and a different* measure of justice is to be meted out to the member of another caste, *both castes being alike citizens of the United States*, both bound to obey the same laws, to sustain the burdens of the same government, and both equally responsible to justice and to God for the deeds done in the body?" *Ibid.*, 2766 (Emphasis added).

Congressman Wilson stated:

> "*One race shall not be favored* in this respect more than another . . . This is the spirit and scope of the bill, and it does not go one step beyond." Ibid., p. 1117. (Emphasis added).

B. This Court has Consistently Found Fourteenth Amendment Protections Equally Applicable to all Groups.

In an early case, this Court emphasized the Fourteenth Amendment's applicability to all races. In *Strauder v. West Virginia,* 100 U.S. 303 (1880), a West Virginia law excluding blacks from juries was struck as violative of the Fourteenth Amendemnt. In doing so, this Court explained:

> "That the West Virginia statute respecting juries is such a discrimination ought not to be doubted . . . nor

> would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws." 100 U.S. 303, at 307.

Similarly, in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) this Court stated:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." 118 U.S. 356, at 369.

See also, *Hernandez v. Texas,* 347 U.S. 475 (1954).

These cases reflect this Court's recognition of the heterogeneous nature of our society. Such judicial recognition explicitly appears in an early disproportionate racial impact case, *Akins v. Texas,* 325 U.S. 398 (1945). Blacks were eligible to be members of the grand jury, but only one black was chosen, less than the proportion of blacks in the community. This Court rejected the argument that disproportionate impact was sufficient to constitute a Fourteenth Amendment violation, stating:

> "The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection." 325 U.S. 398, at 403.

Similar recognition of the heterogeneous nature of our society is seen in more recent cases, such as *Jefferson v. Hackney,* 406 U.S. 535 (1972), where the Court noted that:

> ". . . given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others." *Ibid.,* at p. 548.

In *James v. Valtierra,* 402 U.S. 137 (1971), a referendum requirement in California was challenged as having a disproportionate racial impact. Referendum was required to establish low-income housing but not other issues. This was claimed to violate the Fourteenth Amendment, since low-income housing affected blacks and other minorities far more than whites. This Court rejected the argument, again referring to the heterogeneity of the American people:

> "But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S. 137, at 142.

See also the apportionment cases of *Wright v. Rockefeller,* 376 U.S. 52 (1964) and *City of Mobile v. Bolden,* ..... U.S. ....., 100 S.Ct. 1490 (1980).

The theory was well-stated by Justice Powell in *Bakke,* where he noted that the very concept of "majority" and "minority" groups reflects temporary arrangements and political judgments. The white majority "itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." *Bakke,* 438 U.S. 265, at 295. "Preferences" would require our courts continually to decide how severely different groups had been disadvantaged. As Justice Powell concluded:

> "The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." *Bakke,* at 297.

The implementation of "benign" racial classifications can be a two-edged, or multi-edged, sword. Thus, a classification system, like that of the Department of Corrections, can be used against some of the very "minority" groups it was originally designed to help. Indeed, the record shows how the racial classification system implemented by the Department could be used *against* a minority group it was supposed to aid. See, for example, the statements of Mr. Senon Palacioz (then the Deputy Director of Human Relations for the Department), in executing part of the "Third Quarter Review" (1975-1976) for affirmative action in the Department (in Defendants' Exhibit K, at approximately the 26th page of that Exhibit: "Quarterly Management Review," dealing with Region II, dated May 3, 1976, in Exhibit K). Mr. Palacioz stated, under "New Problems", as follows:

> "(1) 100% of T and D assignments (7) *were to Black staff. Need to make a better distribution.*
>
> (2) Mexican-Americans did not share in 'acting' opportunities." [Emphasis added] Exhibit K, p. 26.

Further, in discussing "unsolved problems from last quarter," Mr. Palacioz listed such problems as follows:

> "(1) Mexican-Americans hold only three (3) of seventy-five supervisory positions.
>
> (2) Mexican-Americans comprise only 9% of the total staff."

This emphasis by a member of one minority group, concerning promotional opportunities for persons from his ethnic background to the seeming detriment of members of another minority group, emphasis the multi-edged nature of the "sword" of racial preferences. Within a prison system already plagued by racial gangs, the continued categorization of employees by race only reinforces the existence of racial gangs and racial violence: Testimony of Warden William Garrison, R.T. 585-586. In the unique situation of the prisons, the categorization by race and sex only exac-

erbates, rather than ameliorates, attitudes of prejudice and distrust.

II.

THE RESPONDENTS UTTERLY FAILED TO ADVANCE AND PROVE AT TRIAL A COMPELLING STATE INTEREST FOR THE USE OF RACIAL CLASSIFICATIONS AND PREFERENCES

Neither Respondents nor the Court of Appeal subjected the system of racial preference utilized by the Respondents to strict scrutiny. The Trial record does not support the Department's contention that its policy of preference reduces racial violence in the prisons. Indeed, the Trial Court found that there was insufficient evidence to justify this purported interest or rationale. Even if such an interest existed, and there was an articulated rationale between the AAP and the interest, the State is still obligated to demonstrate that its actions were taken on the basis of findings or evidence that the use of race would serve such interests:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g., *Teamsters v. United States*, 431 U.S. 324, 367-376, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977); *United Jewish Organizations*, 430 U.S. at 155-156, 51 L.Ed.2d 229, 97 S.Ct. 996; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 15 L.Ed.2d 769, 86 S.Ct. 803 (1966). *After such findings have been made*, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, *the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.*" *Bakke*, 438 U.S. 265, 307-308. (Emphasis added)

This is not a case like *Fullilove v. Klutznick* ..... U.S. ....., 100 S.Ct. 2758 (1980), where special deference is owed to Congressional intent or findings.

Since no special deference is owed to the actions of Respondents in their utilization of the suspect classification of race, and since the Trial Court found that such categorization was not in fact required to achieve a compelling state interest, it is appropriate to review in detail what these purported interests were. In so doing we are mindful of the standards announced by this Court where the "suspect classification" of race is utilized:

> "We have held that in 'order to justify the use of the suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is *"necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" University of California Regents v. Bakke,* 438 U.S. 265, 305 (1978) (Emphasis added)

A. The Respondents Failed to Prove that the Use of Race was Necessary for the Reduction of Violence in the State Prisons.

Petitioners have never disputed the interest of the State in reducing racial conflict and violence in its prison system. However, the record was devoid of evidence showing the *necessity* for *hiring* and *promotion* based upon race in order to serve this interest.

Evidence of any relationship between the race of correctional officers and the reduction of racial tension and violence in the prison was scanty at best, and vigorously contested by Petitioners (see Statement of Facts). The Trial Court did hold that race and sex of employees *could* be used in making "job assignments and in determining the employment responsibilities of its employees." (Finding of Fact No. 19, Pet.App. F p. 6; Conclusion of Law No. 4, Pet.App. F p. 8). However, the Trial Court further held that the use of race and sex in hiring and promotion decisions had not been justified by the Respondents (Findings of Fact No. 8, Pet.App. F, p. 4, Conclusions of Law, No. 2 Pet.App. p. 7).

The scrutiny employed by the Court of Appeal in overruling the Trial Court's finding consisted only of the following casual and conclusory remark:

> "The AAP indicated, and there was evidence, that the desired 'minority' level would serve inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." (Pet. App. A p. 5).

Since the AAP made no reference to desired minority levels serving the inmate related objectives of the Department, the Court of Appeal was compelled to modify its Opinion to delete the assertion that there was such evidence. (Pet.App. B p. 1).

The Court of Appeal extracted from the Trial Court's Finding of Fact No. 19 (a legitimate interest justifying the use of race and sex in job *assignments and responsibilities*) the conclusion that there was evidence that the use of race in *obtaining a desired* level of minority *employment* was necessary to serve the same objective. The Court of Appeal cited no evidence to support this assertion—there is no such evidence in the record. The premise that the use of race or sex is permissible in determining job assignments and responsibilities does not lead to the Court of Appeal's conclusion that a particular level of overall minority and female employment is necessary; there is already a sufficient number of minorities to fulfill the Department's "needs" with respect to assignments and responsibilities.

Any evidence even suggesting a nexus between reducing violence, establishing rapport, the efficient operation of California prisons and the race of correctional officers was scanty at best. More significantly, the record reflects more-than-substantial evidence to support the Trial Court's conclusion that the discrimination in question was not necessary to achieve any such purported interests. Under traditional standards of appellate review (including California), the Court of Appeal improperly substituted its

sociological view of the world for the factual conclusions reached by the trier of fact.

Although the Court of Appeal stated "that there was evidence" to draw a conclusion opposed to that of the Trial Court, the applicable California (and federal) rule is to determine whether there is any substantial evidence to support the Trial Court's finding:

> ". . . Where the findings are attacked for the insufficiency of the evidence, appellate review begins and ends with the determination as to whether there is *any* substantial evidence to support them; that [the reviewing courts] have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." *Overton v. Vita-Food Corp.*, 94 Cal.App.2d 367, 370 (1949).

Thus, reversal by the Court of Appeal if it were of the view that the evidence preponderated in favor of the appellant therein [*Alvaugh v. Mt. Shasta Power Corp.*, 9 Cal.2d 751 (1937)], would be inappropriate; indeed, in reviewing the evidence, the Court of Appeal was bound to accept all reasonable inferences that could be drawn from the evidence most favorable to the respondents in that Court. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427 (1935).

Even if the Trial Court had found that a desired minority level would serve the "inmate related objectives" of the Department, the use of racial classification would nonetheless be constitutionally impermissible. The use of such classifications to serve the "operational needs" of a public employer, or to satisfy community preference, has been repeatedly rejected: *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491 (1972); *Monroe v. Board of Commissioners*, 391 U.S. 450, 459 (1968); *Washington v. Lee*, 263 Fed.Supp. 327 (M.D. Ala. 1966), aff'd per curiam, *Lee v. Washington*, 390 U.S. 330 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Education*,

349 U.S. 294, 300 (1954); *Baker v. City of St. Petersburg*, 400 F.2d 294 (5th Cir. 1968); *Smith v. Board of Education of Morrilton School District, No. 32*, 365 F.2d 770 (8th Cir. 1966).

In *Baker v. City of St. Petersburg, supra,* the police department assigned black patrolmen to black districts, alleging that this was necessary for effective police work. The Fifth Circuit held that the "department's practice of assigning Negroes solely on the basis of race to a Negro enclave offends the Equal Protection Clause of the fourteenth amendment." 400 F.2d 294, 300. In *Lee v. Washington, supra,* this Court rejected the segregation of inmates in various penal facilities, justified by the State as necessary for prison security and discipline. In this case there is evidence that minority correctional officers themselves resent being deemed "specialists" to deal with persons mainly of their race; they often feel they can establish rapport with, and guard, inmates of all races. (RT 585)

B. The Respondents Did Not Advance Prior Intentional Discrimination as a Compelling State Interest for the Racial Classifications in Question.

This Court has held that remedying established past discrimination may be a compelling state interest sufficient to justify the limited use of racial classifications by a public entity. Thus, the Court has found that orders for redistricting and busing are justified only by a finding of prior intentional discrimination. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Green v. County School Board,* 391 U.S. 430 (1968). The same standard was recently advanced in *City of Mobile v. Bolden, supra,* upholding at-large voting election procedures absent a showing of discriminatory intent; this is also the standard where employment discrimination is alleged. *Washington v. Davis,* 426 U.S. 229 (1976).

However, Respondents did not justify their use of racial preferences as a remedy for their prior discrimination. Not

only did they bind themselves with a disclaimer in an answer to an interrogatory (denying previous discrimination) but their case was tried on the basis that the Program was adopted to "serve inmate-related objectives of the Department." (Pet.App. A. p. 5).

After trial, Respondents attempted to gather and introduce evidence of past discrimination. The Court of Appeal upheld the Trial Court's finding that such evidence was "irrelevant" and "made by after-thought, and much too late". (Pet.App. A, p. 23). This ruling was based upon the Trial Court's Finding of Fact No. 13 to the effect that ". . . the acts complained of in the above-entitled action are not justified by, *nor do they remedy,* past wrongs by *society* against such minority or women." (Emphasis added) (Pet. App. F, p. 5).

Moreover, there is no sufficient logical nexus between past discrimination (even if proved) and the remedy of hiring and promoting to reflect percentages found *in the inmate population* to satisfy the standards set forth in any of the opinions set forth in *Fullilove, supra.* In a similar case, the California Court of Appeal had the following to say about attempts to justify minority preference with statistics gathered *after* the commencement of a court action:

> "Minority preference . . . must be remedial, i.e., directly responsive to a demonstrated precedent violation of statutory or constitutional rights. *Post hoc justifications, precipitated by litigation* are an inadequate substitute for the kind of administrative findings required to limit the burden on non-minorities to the confines of the compelling governmental need . . ." *Department of General Services v. Superior Court,* 85 Cal.App.3d 273, at 284 (1978) (Emphasis added).

C. "Adverse Impact" Is Not a Compelling State Interest for the Granting of Racial or Sexual Preferences.

The AAP was not adopted for the purpose of remedying any prior discrimination, intentional or otherwise. Nonetheless, Respondents now suggest that their previously neutral and employment practices did not result in a satisfactory percentage of minorities or women hired or promoted. Respondents equate this lack in percentages with "adverse impact."[10]

In fact, Respondents have no idea of the composition by race or sex of their applicant flow for entry-level positions; they have no idea whether or not they were hiring any particular racial group (or minorities in general), or women, at an even higher percentage than those in the applicant pool. (R.T. 281-282).

Regarding promotions, the statistics cited in the AAP itself (assuming proper tests used to show adverse impact under Title VII standards) demonstrated that there was no adverse impact with respect to minorities or women:

> "Based upon State Personnel Board statistics as of September 30, 1973, the ethnic background of Department of Corrections' personnel are about 80.2% Caucasian, 8.8% Black, 7.4% Spanish Surname, 1.2% Asian, .2% Native American, and 2.2% of other extraction . . . The breakdown of appointment statistics revealed that there were 356 promotions in the Department during the same six-month period. Caucasian personnel comprised 81.2% of those employees promoted while Spanish Surname and Black personnel were represented by 8.4% and 8.1% respectively . . .
>
> Department of Correction [female] personnel reflects a total of only 17.3% . . . the total percentage of promotions received in 1973 is 4.63%. Of this total, 3.61% were males and 1.02% were females." (Ex. R).

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[10]See Respondents' response to an interrogatory, quoted completely, Footnote 9, *supra*, p. 22.

Even if "adverse impact" had been advanced and proved as a compelling interest, the Fourteenth Amendment has consistently been held to require prior *intentional* discrimination to justify imposition of racial classifications: *Washington v. Davis,* 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). See also, *Personnel Adm's of Massachusetts v. Feeney,* 442 U.S. 256 (1979). As this Court stated in *Arlington Heights, supra,* ". . . official action will not be held unconstitutional solely because it results in a racially disproportionate impact." 429 U.S. 252, at 264-265.

Respondents have never contended that their actions were necessary because of any violation of Title VII. Even had they so contended, there is still the serious question, not yet resolved by this Court, as to whether non-intentional, non-purposeful discrimination by public entity employers constitutes a violation of Title VII of the Civil Rights Act, under the 1972 Amendments to that Act. Although that question need not be resolved by the Court in this litigation, we note in passing that the legislative history of the 1972 amendments (not presented to this Court in *Weber*) supports the conclusion that the preferences granted by Responents here are forbidden by the Act.

Much of the debate over the 1972 amendments revolved around the "Philadelphia Plan," which had been upheld as valid by the Court of Appeal the previous year. *Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971). That Plan was mandated by two Executive Orders in June and September of 1969, requiring bidders on any federal, or federally-assisted, construction contract for projects in a five-county area around Philadelphia to submit an affirmative action plan. The Plan was upheld by the Third Circuit, emphasizing that the Plan was a response to serious, established discrimination by both contractors *and* unions in the past.

In the Senate and House debates, there was opposition to the Philadelphia Plan as inconsistent with the notion of equal employment opportunity. See Statements of Senator Ervin, in "Legislative History of the Equal Employment Opportunity Act of 1972" (prepared by the Sub-Committee on Labor, U.S. Senate, November 1972) at 1042-1045.

In House debate, there was an especially important discussion about Title VII and "reverse discrimination." Congresswoman Green opposed racial quotas, believing them inconsistent with the principle of equal employment opportunity. *Ibid.*, at 210-211. Congressman Hawkins assured her that quotas indeed were illegal under Title VII. He stated:

> "Again, some say H.R. 1746 seeks to establish quotas, special treatment, and *discrimination in reverse.* Not only does Title VII prohibit this—it establishes, beyond any doubt—a prohibition against any individual, *white as well as black,* being discriminated against in employment. It seeks only to insure that persons will be treated on their individual merit and in accordance with their qualification." Ibid., at 206 (Emphasis added)

Further, Congressman Hawkins reiterated this point:

> "May I just try to clarify the issue as to what the present law is. It says that it shall be an unlawful employment practice for an employment agency or an employer to fail to or refuse to refer for employment or otherwise to discriminate against any individual. . . . I read that to mean any individual, any person who believes he has suffered *reverse discrimination* has the same protection under the law as the person who believes he has been discriminated against because he happens to be black." *Ibid.*, at 212 (Emphasis added)

Thus, any supposed claim of mere "adverse impact," under Constitutional or statutory standards, must be rejected.

III.

EVEN IF RESPONDENTS HAD SHOWN THAT USE OF RACE WAS NECESSARY TO THE ACCOMPLISHMENT OF A COMPELLING INTEREST, THE AAP IN TEXT, AND AS IMPLEMENTED, WAS NOT NARROWLY TAILORED TO THE ACHIEVEMENT OF THAT INTEREST

In *Fullilove v. Klutznick, supra,* this Court took great pains to indicate that a Congressional "set-aside" for minority contractors, to accomplish the objective of remedying past discrimination, was "narrowly tailored to the achievement of that goal." 100 S.Ct. 2758, at 2776. The Court's analysis included recognition that:

> "Although the statutory M.B.E. provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." *Fullilove, supra,* at p. 2769.

Fullilove follows a line of cases holding that where the government acts to the detriment of an individual's constitutionally protected rights, it must show that there are no alternative ways of achieving a legitimate governmental interest. See, for example, *McLaughlin v. Florida,* 379 U.S. 184 (1964).[11]

There are several aspects in which the Respondents' AAP, both in text and in implementation, fails to meet the standards set forth in *Fullilove* and its predecessors.

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[11]Similarly, this Court has recognized in employment cases that the intrusiveness of remedies on the rights of innocent parties must bear some relationship to the nature and quality of prior discrimination, if any, against the particular group. *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747 (1976); *International Brotherhood of Teamsters v. U.S.,* 431 U.S. 324, 372 (1977).

A. The Program as Implemented Totally Excludes Caucasians and Males from Competition for Certain Entry Level and Promotional Positions.

The AAP as implemented resulted in certain positions, at both the entry and promotional levels, being completely set aside for either minorities or women, violating the standards set forth by Justice Powell in *Bakke,* where he stated that a complete exclusion of non-minorities from competition for positions violates the Fourteenth Amendment. *Bakke, supra,* 438 U.S. 265, at 374.

The situation is also sharply distinguishable from *Kaiser Aluminum Chemical Corp. v. Weber,* 443 U.S. 193 (1979), where the Court noted that the Kaiser Plan did not "create an absolute bar to the advancement of white employees." 443 U.S. 193, 208. Major components of Respondents' plan, as implemented, resulted in an absolute bar.

Turning from the aspects of Respondents' plan having all the subtlety of a blunderbuss, we turn to the components of the plan wherein racial or sex preference was granted so that lesser-qualified persons were promoted over those more qualified.

B. The Affirmative Action Plan as Implemented Was Not "Narrowly Drawn," Even in Those Situations Where Non-Minorities or Males Were Allowed to Compete but Where Preference was Granted so that Lesser-Qualified Minorities or Women Were Hired or Promoted Over More-Qualified Persons.

Respondents' AAP was not designed to remedy past discrimination and there is no scientific or sociological relationship between a particular racial composition of a work force and the ability to reduce violence or establish rapport with inmates. The plan is not "narrowly drawn" to accomplish either end. Assuming *arguendo* that the State has a legitimate interest in somehow achieving a particular racial or sexual composition in the prison

work force, we show that the Plan as drafted and implemented was not narrowly drawn to meet constitutional standards.

1. There were and are alternative means of increasing the number of minorities and women in the Department of Corrections' work force, at all levels.

In the Trial Court, Respondents made no claim that there are not alternative means less intrusive on the rights and interests of innocent co-workers and applicants, by which an increase in the percentage of minorities and women in the work force, at all levels, can be accomplished. As the Trial Court noted, Petitioners herein do not challenge alternative means to increase the numbers of minorities and women in the work force, such as "aggressive recruiting measures, education for all personnel, including supervisors in charge of hiring, firing, and promotions, and special training classes for certain applicant groups and/or Department employees . . ." interested in hiring or promotion. Petitioners simply have no idea, from the record, (because Respondents had no idea) whether the "problem" of alleged low percentages is due to recruiting, to hiring, or to competition between a relatively low-paying law enforcement entity competing with higher-paying law enforcement entities, or whatever. The simple fact of the matter is that Respondents never attempted to show that there were no alternative, less intrusive, means by which minority or female composition of the work force could be increased.

2. The AAP has no time limitation and, on its face, continues indefinitely.

The Court in *Fullilove* emphasized the temporary nature of the Congressional "set-aside" there in question, pointing out that the set-aside would terminate upon the expenditure of the "Round II" federal funds involved. *Fullilove, supra,* at 2780 (opinion of the Court by Chief Justice Burger)

and at 2793 (concurring opinion by Justice Powell); see also *Weber, supra,* at 208.

The text of this AAP indicates that there is *no* time limitation and its implementation is of unlimited duration. Indeed, the goal of the AAP will not be achieved if it is only temporary, since the composition of the Department's work force cannot continue to "mirror" the inmate population, if the latter population fluctuates. Fluctuation is a key matter as far as the Department is concerned, both now and for the indefinite future, as the preferences to be granted (and, therefore, the burdens imposed), vary literally from institution to institution, depending on how the particular institution in question is meeting its "goals". The chances of the same two people, one a minority and one a non-minority, may vary with regard to job opportunities, depending on whether or not goals have been met (i.e., "parity" achieved) at the *particular institution involved.* R.T. 309:10-19; R.T. 376:18-20. If "parity" has not been reached with the inmate population at a particular facility, or even in a state-wide classification, then the "minority" receives preference. If "parity" has, in fact, been reached with the inmate population, then the Department simply hires or promotes the most qualified person. R.T. 691:12-26.

In short, given the wide variance of inmate population, either on an institution-by-institution or a state-wide basis, the Plan by its own terms must continue indefinitely. Respondents have never contended to the contrary.

3. Respondents have not even attempted to show that there are no alternative means of establishing rapport with minority inmates, thus lessening violence in the prisons.

The testimony of Respondents' own witnesses, on cross-examination, and the testimony of Petitioners' expert and non-expert witnesses, amply support the Trial Court's conclusion that there was no nexus *in fact* between the race

of a correctional officer, or the racial make-up of the correctional work force, and the ability of an officer in particular, or that work force in general, to establish rapport with an inmate or a group of inmates, of a particular race. Respondents failed to establish that any such nexus exists, much in the same way that the University of California was unable to show that doctors of a particular race have either the inclination or the ability to provide better health-care delivery to deprived citizens of that same race or ethnic group. See *Bakke, supra,* at 310-311.

Respondents made no attempt to negate other means by which correctional officers, of all races, could better establish "rapport" with inmates of various minority groups; to establish that informal "rap" sessions can not be held between inmates and correctional officers to improve relations; to prove that educational classes will not increase the understanding that correctional officers have of inmates, their backgrounds, and their cultures, etc. Petitioners' expert, Dr. Thomas Szasz, testified that the ability of a correctional officer to establish rapport with members of the same race, or another race, or with members of their sex or the opposite sex, varies from individual to individual. Moreover, the attributes of an individual correctional officer which determine whether inmates like or do not like him/her is determined by the personal behavior and attitudes of the officer toward inmates, rather than whether or not he/she is the same race. R.T. 754-755. The ability of the correctional officer to establish rapport depends more on the personality and life experience of the correctional officer than his/her race or sex. R.T. 755-757. Thus, as noted in *Bakke*, 438 U.S. 265, at 311, a caucasian raised in a disadvantaged community may be far more likely than a "minority" person, who did not grow up in a disadvantaged community, to have a commitment to curing the problems of disadvantaged citizens.

In sum, Respondents made no effort to establish alternative means, such as emphasizing recruitment of disadvan-

taged job applicants, establishing a myriad of educational classes, group sessions, and the like, to increase rapport between inmates and correctional officers, thereby potentially reducing violence in the prisons.

4. The AAP as drafted and implemented does not contain the flexibility necessary to meet constitutional standards.

In *Fullilove*, Chief Justice Burger emphasized the crucial nature of flexibility in any "race-conscious" remedial legislation. In his opinion he stated that it "is significant that the administrative scheme provides for a waiver and exemption." *Fullilove, supra*, at 2779. The opinion emphasized that a waiver could come, upon request of a non-minority grantee, for example, where qualified, *bona fide* minority firms cannot be found. The waiver process could also be invoked when the bid of a minority firm was unreasonably priced, or where the minority firms in question *had not been adversely affected by prior discrimination.* The Court stated:

> "There is also an administrative mechanism, including a complaint procedure, to ensure that only *bona fide* MBE's are encompassed by the remedial program, and to prevent injust participation in the program by those minority firms *whose access to public contracting opportunities is not impaired by the effects of prior discrimination.*" *Fullilove, supra,* at 2776. (Emphasis added).

Here, there is no flexibility nor any means by which disputes over entitlement to preference as a "minority" exists. As found by the Trial Court, Respondents "have no scientific or objective basis whatsoever by which they classified people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants." Pet.App. F pp. 5-6. There is "no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another. can complain, or by which a person complaining

of the categorization of another person may complain." Findings of Fact, No. 16, Pet.App. pp. 5-6.

Thus, under Respondents' program, it is possible for a woman of Irish descent to marry a Mexican-American with a Spanish Surname, and thereafter to receive preference under the Department's AAP. Even the Director referred to the categorization process, and the lack of a dispute-resolution procedure, as "unscientific." See R.T. 290-300, and R.T. 290: 18-27, in particular.

The Department has no rule as to whether a person who is "one-half" "minority" descent qualifies under the Plan, or "one-fourth," "one-eighth," "one-sixty-fourth," and so on. The record amply supports the conclusion of the Trial Court that the arbitrary and capricious nature of the racial categorization process, and the lack of a dispute-resolution procedure, deprives employees of procedural due process of the law under the Fourteenth Amendment. See Conclusion of Law, No. 3, Pet.App. F., pp. 7-8. The situation is sharply different from that described in *Fullilove,* where the Plan in question was flexible to insure that minority contractors *not disadvantaged by prior discrimination* would not benefit from the "set-aside." Here, there is no means of insuring that improper self-identification by an applicant as a minority cannot occur; that such identification will be rectified; or that a non-minority person, who simply has a "Spanish Surname" (such as "Romero", which can be Spanish, Italian, Portugese, Mexican, or "Latino") and potentially no ability better to relate to people of Latin-American ancestry, will not benefit from the Plan.

5. The program was not the product of Collective Bargaining and, as such, has a broader impact upon innocent co-workers in terms of promotional opportunities and in terms of the perceived legitimacy of the plan.

In *Weber, supra,* this Court narrowly approved a limited duration plan that was the fruit of consensual, arms-length

collective bargaining between an employer and a union, both of whom were arguably *in pari delicto* in regards to past employment discrimination against minorities.

As is obvious from our record, the AAP was not the product of collective bargaining or negotiations; indeed, CCOA, a recognized employee organization for correctional officers, vigorously opposes the plan.

We respectfully suggest to the Court that "narrowly drawn" attempts to deal with a problem (or "least intrusive" means, in the employer-employee relations context) must involve bargaining with the recognized representative of the employees affected. Such a plan, even if it adversely affects the interests of innocent co-workers, may well appear more legitimate to them and be therefore perceived as less onerous. They will have had the opportunity to make their feelings known, through the democratic process within their union, as to how the plan is to function, its duration, and whether, in fairness, the employer should make an effort at giving everyone "a little bit bigger pie." In short, we suggest that *the process* itself, where a plan is imposed upon innocent co-workers, is inextricability tied to whether or not the remedy in question is "narrowly drawn" or "least intrusive" (see, in general, *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 [1975]). Hence, a significant element in *Weber* was the desire to allow and/or encourage employers and unions to self-examine and self-evaluate their employment practices. *Weber,* supra, at 204.

A Plan jointly negotiated may well have a less intrusive impact upon innocent co-workers, as in *Weber,* where a new benefit (a training program to increase the promotional opportunities for all in-plant employees), was established in return for a modification of the seniority provisions there in question.

There may well be other "trade-offs" agreed upon by management and labor to meet the interests of co-workers, already hired, in promotional opportunities. We note, for example, the line of cases indicating that, even where past discrimination has been shown, a distinction should be made between the expectations of employees who have already committed to the employer in question, and their expectations, and the interests of applicants for entry-level jobs, who have not so completely burned their bridges. See *Chance v. Board of Examiners,* 534 F.2d 993 (2nd Cir. 1976); *Kirkland v. New York State Department of Correctional Services,* 520 Fed.2d 420 (2nd Cir. 1975).

Thus, the impact of "affirmative action" may be shifted, and the benefits and burdens less drastically distributed, when the plan is collectively bargained as opposed to unilaterally imposed.

IV.

THE RESPONDENTS HAVE FAILED TO ADVANCE AND PROVE AN IMPORTANT GOVERNMENTAL INTEREST NECESSARY FOR THE USE OF GENDER-BASED CLASSIFICATIONS.

To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental purposes and must be substantially related to achievement of those objectives. *Orr v. Orr,* 440 U.S. 268 (1979); *California v. Webster,* 430 U.S. 313, 316-317 (1977); *Craig v. Boren,* 429 U.S. 190, 197 (1976). The California Supreme Court has held sex to be a "suspect classification," subjecting such classification to strict scrutiny and thereby creating greater protection for either sex than under federal authorities. *Sail'r Inn v. Kirby,* 5 Cal.3d 1 (1971). Here the Respondents made no attempt to justify preference granted on the basis of sex by articulating and proving either a compelling interest or an important governmental interest to be served.

Indeed, on the facts of this case it is difficult even to imagine *any* substantial relationship between the preference and the achievement of any governmental interest, articulated or not.

As described earlier, (at p. 16, *supra*), Respondents advanced only passing reference to the assertion that women purportedly brought "an extra dimension or quality" to the job. One of Respondents' witnesses indicated that women made the dining room more orderly and well-behaved, while another claimed they made "a very abnormal environment a little more normal." One of Respondents' witnesses astoundingly testified that female correctional officers were better able to rehabilitate rapists (R.T. 614) and other criminals. (R.T. 615). Assuming that this constituted the articulation of an important government interest, the Trial Court did not prohibit the use of sex in appropriate *job assignments* (Conclusion of Law, No. 4, Pet.App.F, p. 8).

Furthermore, there is no apparent relationship between the accomplishment of such a government interest and the adoption of preferential *hiring* and *promotions* based upon percentage of women in the overall California labor pool; nor would this be a narrowly tailored remedy to justify the infringement of the employment expectations of innocent males. In short, there was no evidence at trial to show what desired level of female employment, if any, would satisfy the purported government interests in "gentility", if you will.

Prior intentional discrimination cannot here be the governmental interest to be served, since the Respondents disclaimed prior intentional discrimination on the basis of sex (*supra,* footnote 9, p. 15). Although this binding disclaimer contained an assertion that there had been adverse impact in hiring and promotion, there was no trial evidence to support it. In fact, at trial, Respondents confessed ignorance of the percentage of women employed

by the Department as compared to the percentage of women who applied (R.T. 281-282). The AAP itself demonstrated that there was no adverse impact in promotions: 17.3% of the Department's personnel were women, but over 20% of all promotions were received by females (see *supra,* pp. 40-41).

While statistics may be probative and can establish a *prima facie* case under Title VII, they are not conclusive on the issue of discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). Had the Respondents engaged in prior discrimination, the percentage of women in the total California labor force would not be the appropriate benchmark for affirmative action. This Court, and other courts, look to the *relevant labor market,* including the relevant geographical areas, *Hazelwood School District v. United States,* 433 U.S. 299 (1977), and the qualified applicant pools, *Equal Employment Opportunity Commission v. United Virginia Bank,* 615 Fed.2d 147 (4th Cir. 1980); *EEOC v. Chesapeake and Ohio Railway,* 577 Fed.2d 229 (4th Cir. 1978). Because Respondents never seriously contended at Trial that they had discriminated against women,[12] this Court does not know the relevant geographical pool. Presumably, it varies from facility to facility, or at least between various geographical areas. Respondents made no showing whatever as to the relevant labor market for entry-level correctional officers.

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[12]Respondents would have been precluded from contending they had discriminated against women in general by the doctrine of collateral estoppel. The Court of Appeal in *Long v. State Personnel Board,* 41 Cal.App.3d 1000 (1974), had previously upheld Respondents' policy (there vigorously defended by Respondents) of issuing "male only" certifications in a correctional setting. See also, *Dothard v. Rawlinson,* 433 U.S. 321 (1977).

V.

THE CONSTITUTIONAL CONTOURS OF A PROPER REMEDIAL PROGRAM, DESIGNED TO REMEDY PRIOR PAST DISCRIMINATION, MUST UTILIZE TRADITIONAL PRINCIPLES OF EQUITY AND MUST TAKE INTO ACCOUNT THE LEGITIMATE EXPECTATIONS OF CO-WORKERS AND CO-APPLICANTS OF ALL RACES AND BOTH SEXES.

Lawyers familiar with the constitutional issues presented to this Court for last five years, in this and similar cases, have formed some notion of the contours of a constitutional plan or program, designed to remedy actual past discrimination against minorities and/or women. The AAP of the Department was neither intended, designed, nor operated to remedy past discrimination. Even had it been so designed, it fails to meet the constitutional standards of a racially-or-sexually conscious remedial program.

Such standards were articulated most eloquently by this Court in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), where the Court had before it the established principle of awarding proven discriminates their "rightful place" with regard to seniority. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). In *IBT*, this Court was confronted with a number of potential discriminatees harmed by the acts of the employer and the question was how such past discrimination should be remedied. This Court first indicated that actual victims of discrimination should be identified, *Ibid.*, 431 U.S. 324, 370-372, and then went on to state:

> "After the victims have been identified, the Court must, as nearly as possible" 're-create the conditions and relationships that would have been had there been no' "unlawful discrimination." *Ibid.*, citing *Franks*, 431 U.S. 324, at 372.

The Court next stated standards which, we submit, are as applicable, if not more so, in this constitutional context

as they were in the statutory context of *IBT*. The opinion stated that a Court:

> "Must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and the private needs as well as between competing private claims.' [citations omitted]. Especially when immediate implementation of an equitable remedy threatens to infringe upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' [citations omitted]" *Ibid,* 431 U.S. 324, at 374-375.

The flexible, equitable, and humane standards proclaimed by this Court should be no less binding upon a public employer, allegedly fashioning a remedy for its confessed past discrimination, than for a Court, whose *finding* of past discrimination must be the basis for any equitable remedy. Indeed, in the context of constitutional protections, public entities must be held to no lower standards than those by which our inferior judicial courts are bound.

VI.
CONCLUSION

This case presents the Court with a grave and crucial issue: May a local governmental entity, absent any prior discriminatory conduct, categorize its citizens by race and by sex, and then grant preferences and impose burdens in public employment? Persons of good will on both sides of this key constitutional and social question ultimately desire a society that is indeed "color blind", a society in which every person will be judged on the basis of merit and ability, without regard to race, sex, ethnic origin, or other irrelevant attributes.

If our local governmental entities themselves may impose racial and sex-based classifications upon their citizens, and grant preferences and impose burdens based thereon, we will only move further away from our ultimate societal goal, thereby reinforcing those shameful and antiquated aspects and attitudes of our social fabric that still remain racist and sexist.

For all of the foregoing reasons, Petitioners respectfully request that the judgment of the Court of Appeal of the State of California be reversed, with instructions to reinstitute the JUDGMENT and PERMANENT INJUNCTION of the Trial Court.

Respectfully submitted,

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